IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 908 of 1996
With
CRIMINAL MISC. APPLICATION NO.128 OF 1997
(Enhancement Application)

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE D.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VIJAY RATILAL PARMAR
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 908 of 1996
MR JB DASTOOR for appellant No. 1
Mr.K.P.Raval, learned Addl.P.P.
for Respondent No. 1

2. Criminal Misc. Application No.128 of 1997
Mr.K.P.Raval, learned Addl.P.P.
for the State.
Mr.J.B.Dastoor for respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE D.K.TRIVEDI

Date of decision: 06/11/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.K.TRIVEDI)

1. The appellant-original accused No.1 has preferred this Appeal and challenged the order of conviction and sentence recorded by the learned Addl. Sessions Judge, Baroda dated 31.8.96 passed in Sessions Case No.213/94, wherein the learned trial Judge has considered the evidence and has convicted the accused for the offence under Section 304 Part II of the Indian Penal Code as well as for the offence under Section 452 of the I.P.C. and after hearing the accused on the point of sentence, the learned Trial Judge has imposed sentence on the accused, the accused to suffer R.I. for five years and a fine of Rs.2000/- and in default R.I. for six months for the offence under Section 304 part II of the I.P.C. and no separate sentence was awarded for the offence under Section 452 of the I.P.C.

2. The appeal is moved by the accused through jail and at the time of admission of the appeal, while admitting the Appeal, the Court has issued enhancement notice of sentence to the appellant. Accordingly Criminal Misc. Application No. 128 of 1997 is also notified before the Court for considering the question of enhancement of sentence imposed on the appellant accused.

3. Mr. Dastoor, learned counsel, appearing on behalf of the appellant during the hearing had taken us through the evidence as well as judgment under challenge. It is his submission that looking to the prosecution case and considering the defence of the accused, the learned trial Judge was not right in accepting the case of the prosecution with the result that the learned trial Judge has convicting the accused for the offence under Section 304 Part II of the I.P.C. and further that even as found from the record and considering the age of the appellant, who at the relevant time was hardly 19 years of age, the learned Judge was not right in not releasing the accused on probation. Mr. Dastoor has also contended while taking us through the evidence of the prosecution witnesses that the prosecution has examined the witnesses, who are related to the complainant and in absence of not examining any independent witness, the evidence of the witness are required to be scrutinised closely and the learned trial Judge has not done the same, which has resulted in miscarriage of justice and further that the trial Court has also not considered the

defence put forward by the accused with the result that the order of conviction came to be passed, which deserves to be set aside and prayed for setting aside the order of conviction and sentence.

4. Mr. Raval, learned Addl. P.P. has supported the reasoning of the learned trial Judge and it is his submission that as found from the evidence, the appellant accused had used knife in commission of the offence and as found from the evidence, the deceased and other injured witnesses were taking their meals in the house and further that the deceased was in helpless condition when the accused had attacked the deceased with knife. While highlighting the prosecution case, he submitted that the appellant-accused and other co- accused had assaulted the deceased and accused No.1 has gave blow with knife on the right thigh of the deceased, which shows that the accused has intention to commit murder. He accordingly submitted that the learned Judge was not right in convicting the accused for the offence under Section 304 part II of the I.P.C.. Once it is established that the accused had an intention to commit murder and accordingly, while arguing the application for enhancement of sentence, he submitted that the sentence imposed by the learned trial Judge is not proper and the same is required to be enhanced.

5. In light of the submissions made before us and on considering the evidence, as per the prosecution case, the incident in question has occurred on 10.11.93 at about 19.15 hours at the residence of the deceased Sanjay, whose house was situate in Navi Ashapuri Block No.5 Nava Yard, Vadodara. The appellant accused with other co-accused had formed an unlawful assembly and with deadly weapons had gone to the house and inquired about deceased Sanjay. The appellant accused had knife and other co-accused, who are brothers and aunt were having deadly weapons like pipe. The appellant accused No.1 had a quarrel and inquired with the deceased Sanjay that "why he had taken side while the incident occurred on yesterday", wherein the deceased Sanjay had informed that he was ignorant about the previous day's incident and at that time the appellant accused gave blow with knife on the right thigh of Sanjay, while other accused namely, accused No.2 Navinchandra, the brother of the appellant and another brother Mukesh accused No.3 and Pushpaben, wife of Ambalal, also gave blows with the pipe to Champaben as well as gave blows to Vimlaben. The chargesheet is submitted against all the accused that the accused had unlawful assembly as well as the accused had committed an offences under Sections 302, 143, 147, 148,

149, 323, 324, 452 and 504 of the I.P.C. and Section 135 of the Bombay Police Act.

6. During the trial, the prosecution has examined Champaben - the complainant, whose evidence was recorded at Exh.17, has deposed that she stays in Nava Yard, Navi Ashapuri Mohalla, Block No.5 at Vadodara and stays with her husband and children. She has two sons and two daughters. Deceased Sanjay was elder son. While narrating the incident, she has deposed that on 10.11.93 at about 7 P.M. she and her husband and her two sons were in the house and they were taking their dinner. At that time from the outside there was inquiry about her son Sanjay and they asked Sanjay to come out. Her son Sanjay has inquired who are they and Sanjay has called them inside the house. At that time, Pushpaben Ambalal accused No.5, Vijay Ratilal- accused No.1, Navin Ratilal - accused No.2 and Mukesh Ratilal - accused No. 3 came inside the house and all had entered the house. All the family members got frightened and they went to the Ossari. Accused No.5 - Pushpaben Ambalal and accused No.1 - Vijay have also asked Sanjay that, "why yesterday during the dispute involving Vimlaben, he has helped Vimlaben". At that time Sanjay has told him that he has no idea about such incident as he had gone to his service and he has further stated that he has not helped any one. Accused No.5 Pushpaben Ambalal had also asked Champaben that, "why yesterday you have separated Peterbhai', who is the husband of Vimlaben. At that time, Ambalal accused No.6 and Ratilal - accused No.4, were standing outside the house and they instigated the accused by saying that, "you beat them". The witness and her son Sanjay were frightened and they have also raised cries. At that time, accused No.5 Pushpaben was having in her hand a pipe, Navin accused No.2 was also having a pipe with him and Mukesh accused No.3, who was also having a pipe with him. They tried to beat and when they raised cries, accused No.1 - Vijay had taken out knife and gave blow with knife on Sanjay on right thigh. To rescue him, witness has fallen down on her son Sanjay. At that time accused No.5 Pushpaben gave two to three blows on her left hand. Accused No.6 Ambalal had also given one blow with hockey to Kalpanaben and the accused No.1 also gave blow to Vijay and Pushpaben accused No.5 gave blow on the head of Vimlaben. Ratilal - accused No.4 had also given pipe blow to her daughter Kalpana on her left eye brow. All the persons from the locality had gathered. The accused had run away. A rickshaw was called and her son Sanjay and she herself were taken to S.S.G. Hospital where Doctor has declared her son dead. She had also narrated about the incident to the Police when she was

taken in a Jeep to Sayajigunj Police Station. Due to injuries sustained by Champaben and other witnesses, namely, Vimlaben and Kalpanaben, they were also treated in the SSG Hospital. Kalpanaben was treated as an indoor patient in the Hospital. As per her evidence, the motive for crime was suggested that there was a dispute in respect of Wall between the houses of Pushpaben and complainant and prior to two to three days of the incident, there was a fight between Vimlaben and Pushpaben. In that incident, they have not given support to Pushpaben for which the accused had taken grudge and assaulted her son and other witnesses. She has also identified the accused to the crime in the Court and as per her evidence there was a blood mark at the place where the incident has taken place. She has also identified the knife which was used in the commission of the offence, which was with accused No.1. He has also identified the other weapons that the accused had used in the commission of the offence, namely, hockey and iron pipes. In the cross - examination she had admitted that she has not stated in her complaint that Sanjay does not know about the incident and he has gone for service. She has further admitted that near her house there are many houses and many people are residing there and at the time of incident, many people had gathered. She has further admitted that deceased Sanjay was arrested by the Police and a case was registered and her son was released on bail. She had denied the suggestion that it is not true that her son Sanjay was released on bail on condition that he should not contact the prosecution witnesses nor he should give threat to the prosecution witnesses. She has further denied that in that case, to compromise with the other side, her son was administering threat to the accused. In the cross examination, she has also admitted that in that case a complaint was filed against her son by accused No.1 and accused No.2 was the witness to that incident. In the cross-examination she has also admitted the fact about the complaint being filed against the neighbours, even including Pushpaben, one of the accused, in the year 1993 and in the said complaint, there was a compromise before the Executive Magistrate. In cross-examination she has denied that Navin, Manilal and her son Sanjay have become friends and they used to move together. She has denied the suggestion that prior to half an hour of the incident he son Sanjay and Manilal were sitting in the Shop of Munnabhai. His son Sanjay had gone to Ranoli early in the morning at 5.30 and he was working in I.T.I. as an apprentice and he used to come every day in the evening at 6.30 P.M. On the day of the incident, her son Sanjay had returned at 6.45 P.M. and he took his bath and tea and all had taken dinner.

It is further found from the cross examination, wherein, she has deposed that they reached the Hospital between 7.30 to 8 P.M. where there was a police personnel and the police had also inquired with her about the incident and how many persons were there in the incident. She had admitted that after giving the information to the Police, the case papers were taken out. The case papers were of Sanjay, herself and Vimlaben. The Doctor has examined them and inquired about the injury. Kalpanaben came in a rickshaw after they reached in the Hospital. Kalpanaben came with Vimlaben and immediately they came after they reached the hospital. She has denied that Manilal had separated the witness and Pushpaben. In the incident which has taken place involving Vimlaben, her son Sanjay had not taken any part. In the incident which has occurred, there was no fight between Sanjay, Pushpaben, Navin and Vijay. Their house is situate in a Jupadpatti where there is a road. There was some dispute in respect of putting up of the Statue of Mother Marium. She has denied that she has filed complaint against her neighbours. She has admitted that later on the Statue of Marium was handed over to them. She has denied that Vimlaben's husband Peter was consuming liquor for which the neighbours had given application. It is further found from the cross-examination that Daud Mohan is the elder brother and her other brother's name is Madhukant, Dilip and Mahendra. She has denied that all the brothers were doing the business of liquor and all the four brothers are head strong persons in the area of Nizampura. She has admitted that there are cases registered against them. She has further denied that because of her brothers she used to give threat to Vijay as well as his family members. She had denied that on the day of incident, accused No.1 Vijay had gone to his uncle's place to give butter milk and further that at the time she has stopped Pushpaben and asked her why she permitting Vijay to come. She has denied that Pushpaben has asked her that she should not give any abuse. She has denied that at the time Manilal had separated she and Pushpaben. She has denied that there was a scuffle and some unknown person gave blow to Sanjay with knife. In the cross examination, she has also denied that a complaint was filed involving all the accused falsely and she deposed falsely against the accused before the court.

6.1. Dr.Sunilkumar, P.W.No.2, has deposed at Exh.18 that on 10.11.93 at 9.55 P.M. he was on duty as a Medical Officer attached to S.S.G. Hospital and Kalpanaben came without Police Yadi for treatment. He has treated Kalpanaben and as per the history given by Kalpanaben, the incident in question has occurred at 7.15

P.M., where she was beaten with pipe. He has noted down the injury, which has occurred on Kalpanaben on the right eye brow by 1.5 x 0.5 C.M. and she has a complaint of pain on the back. Patient was referred to Surgical Department and he has issued Medical Certificate about injury, which is proved and the Certificate is at Exh.19. The Doctor has also deposed that such injury is possible by pipe. In cross-examination it is admitted that the injury was of simple nature.

6.2. P.W.No.3 Dr.Sutpa was attached to S.S.G. Hospital as a Tutor in Forensic Medicine. On 11.11.93 at 9.30 A.M. dead body of Sanjay was received for post mortuam examination. He performed the post mortuam of deceased Sanjay and he has proved the post mortuam note and he noted the injuries found on Sanjay in Column No.17, which are as under:-

"Stab injury over the upper 1/3 right thigh, along its inner aspect 18 Cm. below anterior iliac spine measuring 3 x 2.5 cm. with a depth of 5 cm. angles are exento angles,marigns are clear cut. On dissection below the femoral artery. Vein have cut on the medial aspect. Diffuse haematoma over an area of 10 x 7 cm. around the stab injury."

Cause of death is shown as death due to shock and haemorrhage following stab injury. The Doctor has also deposed that such injury is possible by knife.

6.3. P.W.No.4 Kalpanaben, who is also an injured witness, has deposed about the incident, which has occurred on 10.11.93. She has deposed that when she was sitting in her house, after hearing the shouts from the house of her mother, she went and she saw her Mummy and her brother Sanjay and other persons, namely, accused No.1 Vijay and other accused and some altercation was going on between them. Accused Pushpaben was asking her mother that, "why they have taken side when the incident has taken place yesterday between Pushpaben and Peterbhai". Near the door of the house accused Ambalal and accused Ratilal were also standing and when accused Ambalal and Ratilal had asked to beat, accused No.1 had taken out a knife from the pocket and gave blow on the right leg thigh of her brother Sanjay. At that time, when she went to rescue her brother Sanjay, accused Pushpaben with the iron pipe gave two blows on left hand of her mother. Accused Ratilal also gave two blows with the hockey on her and Ambalal also gave blow on the right eye brow with pipe. Immediately, thereafter, Vimlaben came running and all the accused has left the house. Her

brother and she was taken to Hospital. She was admitted as an indoor patient in the Hospital. For the incident, her mother has filed a complaint before the Police. In the cross-examination she has admitted that in her police statement she has not stated that she was sitting outside her house. She has also admitted that in the hospital she has stated to the police that the incident in question occurred at 7.30 P.M. She has denied that she has stated in the police statement that on 9.11.93 an incident took place between Ambalal and Navin. She has admitted that her husband was arrested by the police in a rape case. She has denied that her husband was detained under PASA. She has denied that prior to two to three months of the incident, her brother Sanjay and Hasmukh had given blow to accused No.1. However, she has admitted that a case was registered against her brother and Hasmukh.

6.4. P.W.No.7 Vimlaben had also deposed about the incident. According to her between 7 to 7.15 P.M. when she was sitting in her house, there was altercation in the house of Champaben. Champaben's daughter is also residing opposite her house. She and Kalpanaben have gone to the house of Champaben, where she saw all the accused and there was an altercation between them. Accused Ratilal and Ambalal were standing outside the house. She has also explained the incident where accused Pushpaben had given pipe blows to her and accused No.1 Vijay had given blow to Sanjay on his right thigh with a knife. She has also identified the weapon used in the commission of the offence in the Court. In the cross-examination she has admitted that in her police statement she has not stated that she was sitting at the Otla of her house and Champaben's daughter came running and she also ran. She has denied that she and Kalpanaben had not gone to the house and when Kalpnaben has given statement to the police, she was not present and she is deposing to help Champaben.

6.5. P.W.No.11 Haiderali was the investigating officer. He has deposed that on 10.11.93 he was working as Police Inspector attached to Sayajigunj Police Station and a message was received from the control room and accordingly he went to SSG Hospital. Champaben gave complaint in respect of the incident. He has proved the complaint of Champaben, which is Exh.42. The offence was registered and during investigation he has drawn the inquest Panchanama of the dead body of Sanjay, which is Exh.30. He has also drawn the panchanama of the scene of offence, which is on record at Exh.35. He has recorded the statements of the witnesses and also inquired about

the accused. However, accused were not found.On 21.11.93 as per the information received by him, the house of the accused were searched and accused were arrested under Panchanama. He has also proved the arrest panchanama of the accused, which is at Exh.37. At the instance of the accused, the weapons were seized under Panchanama. The blood stained clothes of the deceased were also recovered and clothes and the weapon were sent for examination before Forensic Science Laboratory. He has admitted in his cross-examination that he has not recorded any statement except that of the relatives of the complainant. A contradiction is also proved through this witness. The report of the Forensic Science Laboratory Exh.33 and the Serologist's Report show that in the cloth of the deceased, human blood of Group 'A' was found. On the knife also human blood of Group 'A' was found. This group was the blood Group of deceased.

6.6. Ranjitsinh, P.W.No.6, has proved the Map prepared by him, which is at Exh.27. In the cross-examination it is found that nobody has shown the place of incident and he has drawn the Map while taking help from the Panchanama.

7. The learned trial Judge after considering the evidence of the prosecution witnesses, has recorded the finding that even as per the evidence of the prosecution witnesses, accused No.5 Pushpaben, accused No.2 Navinchandra and accused No.1 Vijay and accused No.3 Mukesh have entered the house of the deceased. While accused No.4 Ratilal and accused No.6 Ambalal were standing at the entrance of the house. Accused No.1 had entered the house having weapon, namely, a knife and other accused had iron pipes and hockey stick. The learned Judge has recorded a finding that the prosecution has failed to prove that all the accused had gathered by forming an unlawful assembly with an intent to commit murder of Sanjay and to cause injury to the prosecution witnesses and the prosecution has failed to establish the case against the accused for the offence under Sections 143, 147, 148 and 149 of I.P.C. The learned judge has further recorded a finding that as the prosecution has not led any evidence to show that the accused has committed offence under the Bombay Police Act and in absence of such notification issued by the Police Commissioner under Section 135 of the Bombay Police Act, even the accused are not held responsible for the offence under Section 135 of the Bombay Police Act and further looking to the evidence adduced by the prosecution, it is not established that any of the witness with accused no. 2 and accused no. 3 had participated in the offence and

the prosecution has failed to establish beyond reasonable doubt accused no. 2 and accused no. 3 has committed offence and accordingly, learned judge has acquitted No.2 Navinchandra and accused No.3 Mukesh by giving benefit of doubt. The learned Judge has further held that accused No.4 Ratilal, accused No.5 Pushpaben and accused No.6 Ambalal were guilty for the offence under Sections 324, 452 and 114 of the I.P.C. Considering the medical evidence that deceased Sanjay had one injury on right thigh, the learned Judge has held that there was no intention on the part of the accused to commit murder. It is further observed by the learned Judge, as found from the evidence, that at the time of incident, there was an altercation between the accused and the prosecution side and accused No.1 attacked Sanjay by giving blow on the right thigh and considering the medical evidence regarding injury found on deceased Sanjay before the court, the learned Judge has found that the accused No.1 has committed offence and is guilty for the offence under Section 304 Part II of the I.P.C. while accused Nos.4, 5 and 6 were convicted for the offences under Sections 324, 452 and 114 of the I.P.C. After hearing on the point of sentence and after considering the report received under Probation of Offenders Act, the learned Judge has imposed sentence of R.I. of 5 years by imposing a fine of Rs.2000/- and in default of non payment of fine, the accused No.1 has to undergo further R.I. for six months. While other accused, namely, accused No.4 - Ratilal, accused No.5 Pushpaben and accused No.6 Ambalal were imposed sentence of Rs.500/- and released on probation for a period of 6 months.

8. Considering the submissions of Mr.Dastoor and as found from the evidence of the eye witnesses, who had also sustained injuries in the incident and prosecution has also proved the injuries by examining the Medical Officer, the learned Judge has rightly accepted the evidence of complainant Champaben, who is the mother of the deceased Sanjay. The incident in question had occurred in the residential house of the complainant. It is true that the Panch has not supported in respect of the Panchanama of the scene of offence, that is hardly material in view of the fact that it is established from the evidence that Sanjay was attacked by accused No.1 and the weapon used is knife and blood stains were also found in the house of the complainant. The presence of other witnesses, namely, mother and sister, is natural in the house and they have also sustained injuries. In view of the fact that the prosecution witnesses have established and highlighted about the incident in question in which

the incident has happened, wherein, deceased was attacked by appellant-accused No.1 with knife and even other accused had also gave blow with weapon like hockey and pipe to the other witnesses. Their injuries is proved through medical evidence. The incident in question has occurred in the house, surely, the witnesses bound to be related to each other. It is admitted by the complainant that many people has gathered outside the house but surely, it is not necessary that they have seen the incident. Further that the witnesses, who have examined had also sustained injuries and their injuries are duly proved. According to us the contention of Mr. Dastoor that no independent witness has examined, is hardly relevant. In our view, the learned trial Judge was right in convicting the accused by accepting the prosecution case and it is difficult for us to hold that the learned trial Judge has committed error in accepting the prosecution case. In our view, there is no error committed by the learned Judge while accepting the evidence of these witnesses. It is difficult for us to hold that the learned Judge was not right in accepting the evidence of the prosecution witnesses, namely, the evidence of Champaben and other witnesses and further, the learned Trial Judge has also considered the medical evidence and has convicted the accused-appellant for the offence under Section 304 Part II of the I.P.C. On considering the application for enhancement and as contended by Mr. Raval, learned APP that the sentence awarded by the learned trial Judge is not proper and sentence is required to be enhanced in light of the discussions hereinabove. It is difficult for us to accept the contention of Mr.Raval that learned Judge has committed error while convicting the accused under Section 304 Part II of the I.P.C. and impose sentence to suffer R.I. for 5 years and fine of Rs.2000/- or in default R.I. for 6 months. As found from the record at the time of conviction, the appellant-accused was of the age of hardly 19 years. The evidence also shows that the brothers of the complainant were also involved in many criminal cases and looking to the medical evidence the deceased Sanjay had only one blow on right thigh, it is not possible for us to enhance the sentence imposed by the learned trial Judge. Accordingly we pass the following order:

The order of conviction recorded by the learned trial Judge convicting the appellants accused for the offences under Section 304 Part II and Section 452 of the I.P.C. is confirmed as well as the order of sentence imposed on the appellants accused is also confirmed. Appeal is

dismissed. Criminal Misc. Application for notice of enhancement is discharged.

(R.K.Abichandani,)

(D.K.Trivedi,J)

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